

No. 6253

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

CHARLES E. DYER, Administrator of the
Estate of Omey E. Dyer, Deceased, and
CHARLES E. DYER, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of the Record

Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.

STRAWN & CO., INC., PRINTERS, BOISE, IDAHO

FILED

JUN 11 1937

PAUL P. O'BRIEN,



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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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INDEX

	PAGE
Answer	15
Assignments of Error.....	101
Bill of Exceptions	25
Witnesses on Behalf of Plaintiff:	
Dunn, C. A.	56
Dyer, Charles E.	27
Gardner, Beulah	53
Gardner, John A.	34
Hampton, Dr. J. O.	69
Hoeffler, Albert	51
Hunt, Dr. Warren C.	61
Jones, Owen J.	32
Springer, A. T.	29
Thompson, George	44
Thompson, Wesley C.	46
Certificate of Judge to Bill of Exceptions.....	98
Citation on Appeal	111
Clerk's Certificate	112
Complaint	9
Court Minutes of March 9, 1932.....	21
Demand for Production of Papers at Trial.....	18
Judgment on Verdict	24
Motion for Directed Verdict.....	20
Order Allowing Appeal	105
Petition for Appeal	100
Praecipe for Appeal	108

INDEX—(Continued)

	PAGE
Stipulation	110
Undertaking on Appeal	106
Verdict	24

IN THE
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CHARLES E. DYER, Administrator of the
Estate of Omey E. Dyer, Deceased, and
CHARLES E. DYER, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 801

COMPLAINT

Filed Sept. 1, 1931

Comes now, the plaintiff in the above entitled action and complaining of the defendant alleges as follows, to-wit:

I.

That the plaintiff herein is now a resident and citizen of Blackfoot, County of Bingham, State of Idaho, in the Eastern Division of the District of Idaho.

II.

That Charles E. Dyer is the duly appointed, quali-

fied and acting Administrator of the Estate of Omey E. Dyer, deceased; that he is the father of Omey E. Dyer, deceased, and was named as beneficiary in the war risk insurance policy hereinafter referred to.

III.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to Omey E. Dyer by the defendant.

IV.

That on the 5th day of August, 1918, Omey E. Dyer enlisted for military service in the United States Army and served as a member of said United States Army continuously until he was honorably discharged from said United States Army on the 25th day of April, 1919.

V.

That while in the said United States Army, and during the period between his said enlistment, and his honorable discharge as aforesaid, Omey E. Dyer desiring to be insured against the risks of war, and on or about August, 1918, applied for a policy of war risk insurance in the sum of Ten Thousand Dollars (\$10,000.00), and at the time of said application authorized the deduction from his service pay of all premiums that might become due thereon, and thereafter there was deducted

from his monthly pay certain sums of money as premiums for said insurance to and including the month of May, 1919.

VI.

That a certificate of war insurance was duly issued by the terms whereof the defendant agreed to pay Omey E. Dyer \$57.50 per month in the event that he suffered total and permanent disability, but that no policy of insurance was ever delivered to Omey E. Dyer or this plaintiff.

VII.

That while Omey E. Dyer was in the military service of the United States as aforesaid and during the World War, and subsequent to the effective date of said insurance, and while said policy was in full force and effect, this plaintiff served in the American Expeditionary Forces in France and while in France and in November, 1918, the said Omey E. Dyer was crushed in and about the abdomen by a truck and underwent exposure to the elements and suffered from the lack of shelter, food and water, and contracted hernia, adhesions, hypochlorhydria, Ileo Caecal Stasis, Gastroenteroptosis, Hyperthyroidism and Pharyngitis, and has continuously suffered from and been afflicted with general weakness and nervousness engendered by said exposure, hardship and injuries and diseases from a time prior to said discharge and from a time when said insurance was in full force and effect, and this plaintiff is informed and believes, and upon information and be-

lief alleges the fact to be that as a result thereof and of said injuries and diseases the said Omey E. Dyer became and was, at the time of his said discharge, and during the time said insurance was in full force and effect, totally and permanently disabled, and that this plaintiff is informed and believes, and upon information and belief alleges the fact to be that Omey E. Dyer was always so disabled and that as a result thereof he died upon the 1st day of May, 1929. That by reason thereof he became entitled to receive from the defendant the sum of \$57.50 per month from the date of discharge, to-wit: April 25th, 1919, to the present time.

VIII.

That heretofore and upon the 23rd day of December, 1930, this plaintiff demanded of the defendant in writing payment of the benefits of said war risk insurance and on said date filed with the United States Veterans Bureau a written claim for said war risk insurance, but said defendant and said United States Veterans Bureau and the Director thereof and the Administrator of Veterans Affairs have disputed and denied the claim of this plaintiff and have failed and refused and now fail and refuse to make payments thereunder, and that said claim was denied by defendant on the 16th day of August, 1931; that the period of time elapsing between the filing of said claim with the United States Veterans Bureau and the denial thereof was more than six months; that a disagreement exists between the plaintiff and defendant and that

said disagreement has existed since the 16th day of August, 1931.

WHEREFORE, this plaintiff demands judgment against the defendant in the sum of \$57.50 per month, from the 25th day of April, 1919, together with interest thereon, and his costs and disbursements herein incurred, and attorneys' fees, and that this Court determine what is a reasonable fee to be allowed plaintiff's attorneys, and direct the payment of said fees to plaintiff's attorneys.

Hawley & Worthwine,
Residence: Boise, Idaho;
Earl W. Corey,
Residence: Blackfoot, Idaho;
Attorneys for Plaintiff.

(Duly verified.)

(Title of Court and Cause.)

ANSWER

Filed Jan. 15, 1932.

COMES NOW the defendant in the above entitled action, and answering plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

Answering Paragraph I of plaintiff's Complaint, this defendant admits the allegations contained therein.

II.

Answering Paragraph II of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

III.

Answering Paragraph III of plaintiff's Complaint, this defendant admits the allegations contained therein.

IV.

Answering Paragraph IV of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that the insured was drafted for military service in the United States Army on August 5, 1918, and was honorably discharged therefrom on April 25, 1919.

V.

Answering Paragraph V of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that on August 8, 1918, the insured applied for and was granted \$10,000.00 of war risk term insurance, and that premiums thereon were paid to include the month of April, 1919.

VI.

Answering Paragraph VI of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that a certificate of war risk insurance was duly

issued by the terms whereof the defendant agreed to pay the insured \$57.50 per month in the event that he suffered total and permanent disability while said policy of insurance was in full force and effect.

VII.

Answering Paragraph VII of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

VIII.

Answering Paragraph VIII of plaintiff's Complaint, this defendant denies each and every allegation contained therein, except insofar as said paragraph alleges that a disagreement exists between the plaintiff and the defendant, and in this connection it is admitted that a disagreement exists between the plaintiff and the defendant.

WHEREFORE, having fully answered plaintiff's Complaint, defendant prays that said Complaint be dismissed, and that plaintiff take nothing thereby, and that defendant have judgment for its costs.

H. E. RAY,

United States Attorney for the
District of Idaho.

RALPH R. BRESHEARS,

Assistant U. S. Attorney for the
District of Idaho.

Attorneys for the defendant.

(Duly Verified.)

(Title of Court and Cause.)

DEMAND FOR PRODUCTION OF PAPERS
AT TRIAL

Filed Feb. 20, 1932.

To H. E. Ray, United States Attorney for the District of Idaho, and Q. A. QUIGLEY, Insurance Attorney for the United States Veterans' Bureau, Boise, Idaho, and to the Defendant above named:

You and each of you will please take notice that the plaintiff in the above-entitled action hereby demands that you produce at the trial of the above-entitled cause to be held at Pocatello, Idaho, on or about March 9, 1932, the following named papers, records and documents:

1. All physical examination reports made by the defendant of plaintiff, including all X-ray pictures in your possession.
2. All ratings for compensation, or otherwise, made by the United States Veterans' Bureau and pertaining or relating to the plaintiff.
3. His complete Veterans' Bureau file including hospitalization, compensation and insurance, and all his physical examination reports including X-ray pictures and physical and clinical findings.

4. The service records of said plaintiff while in the military service of the defendant during the period of the World War and particularly any and all records that relate to the physical condition of said plaintiff while in said military service, including hospital and clinical records.

Dated this 20th day of February, 1932.

EARL W. CORY

Residence: Blackfoot, Idaho;

HAWLEY & WORTHWINE,

Residence: Boise, Idaho;

Attorneys for Plaintiff.

Service of the above and foregoing Demand to Produce is hereby accepted this 20th day of February, 1932.

H. E. RAY,

United States Attorney

for the District of Idaho.

Q. A. QUIGLEY,

Insurance Attorney for

U. S. Veterans' Bureau,

Boise, Idaho.

(Title of Court and Cause.)

MOTION FOR DIRECTED VERDICT

Filed March 9, 1932.

Comes now the defendant at the close of the evidence on behalf of the plaintiff, the plaintiff having rested and the defendant having rested, moves the Court to direct a verdict in favor of the defendant upon the ground that the evidence is insufficient to show that the insured became totally or permanently or totally and permanently disabled within the meaning of the insurance policy at a time when the policy was in full force and effect.

2. That the evidence affirmatively shows that in fact the insured did follow continuously a gainful occupation subsequent to the lapse of the policy.

3. That the evidence affirmatively shows that the insured followed a substantially gainful occupation during the years 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, and 1927.

4. That a verdict should be directed as to any payments claimed to accrue after May 1, 1929, the date of the death of the insured for the reason that the complaint does not plead any contract for the payment to

beneficiary of any such payments after the death of the insured.

H. E. RAY

U. S. Atty. for the Dist. of Idaho.

SAM S. GRIFFIN

Ass't U. S. Attorney for the District
of Idaho.

Q. A. QUIGLEY.

(Title of Court and Cause.)

COURT MINUTES OF MARCH 9, 1932

The defendant's motion to suppress portions of the depositions of John A. Gardner, Beulah Gardner and C. A. Dunn came on for hearing before the Court, counsel for the respective parties being present. After hearing counsel, the Court granted the motion in part and denied the same in part. The plaintiff was granted exceptions to the order granting said motion in part, and the defendant was granted exceptions to the order denying said motion in part.

TRIAL

(Reported by L. G. Hamilton and R. D. Bistline)

This cause came on for trial before the Court and jury, Messrs. O. W. Worthwine and Earl W. Corey,

appearing as counsel for the plaintiff and Sam S. Griffin, Assistant District Attorney, and Q. A. Quigley, Insurance Attorney for the United States Veterans' Bureau, appearing for the United States.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. Henry S. Woodland, Henry Higson and Theo. Turner, Sr., whose names were so drawn, were excused on the plaintiff's peremptory challenge; and Chas. Lailatin and H. D. Davis, who were also drawn, were excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to-wit:

Wm. L. Skidmore, Thos. M. Hughes, Stewart McCutcheon, Geo. W. Matthews, Joseph Chester, Reginald H. Cleare, George Giffings, K. M. Skaigiris, Henry A. Reynolds, J. B. Haddock, Stuart J. Davis and M. D. Bayley.

The Court announced that both parties may have exceptions to all adverse rulings.

After a statement of the plaintiff's case by his counsel C. E. Dyer, A. C. Springer, O. J. Jones, George Thomas, Wesley Thomas, Albert Hofer and Dr. J. O.

Hanson were sworn and examined as witnesses and the depositions of several witnesses were read and other evidence was introduced on the part of the plaintiff, and here the plaintiff rests. The defendant rested and the evidence was closed.

The defendant moved for an instruction to the jury to return a verdict for the defendant. After hearing argument of counsel, the Court granted the motion and instructed the jury to return a verdict for the defendant.

The plaintiff was granted exceptions and sixty days in which to prepare, serve and lodge proposed bill of exceptions.

The jury retired and subsequently returned into court and presented their written verdict which was in the words following, to-wit:

(Title of Court and Cause.)

Verdict

“We, the jury in the above entitled action, acting on instructions of the Court, find for the defendant and against the plaintiff.

Henry A. Reynolds, Foreman.”

The verdict was recorded in the presence of the jury and then read to them, and they each confirmed the same.

(Title of Court and Cause.)

VERDICT

Filed March 9, 1932

We, the jury in the above entitled action, acting on instructions of the Court, find for the defendant and against the plaintiff.

Henry A. Reynolds, Foreman.

(Title of Court and Cause.)

JUDGMENT ON VERDICT

Filed March 10, 1932

This action came regularly on for trial, said parties appearing by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action and evidence introduced on the part of the plaintiff. On motion of defendant's counsel the Court instructed the jury to return a verdict for the defendant and against the plaintiff. The jury thereby retired and subsequently returned into court, and, being called, answered to their names and presented their written verdict, as follows:

(Title of Court and Cause.)

Verdict

“We, the jury in the above entitled action, acting on instructions of the Court, find for the defendant and against the plaintiff.

Henry A. Reynolds, Foreman.”

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff take nothing upon his complaint herein, and that the defendant recover from the plaintiff its costs and disbursements herein incurred in the sum of \$30.00.

Witness the Honorable Charles C. Cavanah, Judge of said court, and the seal thereof this 9th day of March, 1932.

(Seal)

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

Filed May 12, 1932

BE IT REMEMBERED, That the above-entitled cause came on for hearing before the Honorable Charles C. Cavanah, District Judge, with a jury, at Pocatello, Idaho, upon the 9th day of March, 1932, at 10:00 o'clock A. M. at which time the following proceedings were had:

“MR. WORTHWINE: I would like to ask counsel if they have produced the papers we have demanded, the service and hospital records of the defendant, of Mr. Dyer?”

MR. GRIFFIN: We have no service record.”

WHEREUPON, a jury was impaneled.

“MR. WORTHWINE: It is stipulated, if your Honor please, that Omey E. Dyer entered the United States Army August 5, 1918, and was honorably discharged April 25, 1919; that on August 8, 1918, he applied for and received a policy of insurance in the amount of \$10,000.00, payable in monthly instalments of \$57.50 per month; that the policy was in force by virtue of the actual payment of premium, and including the grace period, to midnight of May 31, 1919; that Omey E. Dyer died May 1, 1929; and that his father, Charles E. Dyer, is the beneficiary named in Omey E. Dyer’s policy of war risk insurance.

MR. GRIFFIN: It may be so stipulated.

THE COURT: All right.

MR. GRIFFIN: May it be understood we may have an exception to all adverse rulings of the Court.

MR. WORTHWINE: Yes, both parties.

THE COURT: Very well, both parties.”

WHEREUPON, after an opening statement by counsel for the plaintiff, the cause continued.

CHARLES E. DYER, a witness called on his own behalf, after having been first duly sworn on oath, testified as follows:

DIRECT EXAMINATION

By Mr. Corey.

“MR. COREY: He is quite hard of hearing.

MR. GRIFFIN: I wonder if you would instruct him not to answer until I can object, if I have an objection.

Q. Mr. Dyer, when I ask you a question, if Mr. Griffin should object, you wait with your answer until he has time to object.

A. All right.”

My name is Charles E. Dyer. I am plaintiff in this action. I live at Blackfoot, Idaho. I have lived there since 1917. I am a farmer by occupation. I am the father of Omey E. Dyer. I remember when Omey E. Dyer returned to Blackfoot after his discharge from the army. It was sometime in May, the month of May, in the year after the Armistice was signed. He stayed at my place.

“Q. Did he work?

A. He helped around with me. He wasn't able to go on.

MR. GRIFFIN: Just a minute. I move to strike

'he wasn't able to go on', as a conclusion.

THE COURT: It may be stricken."

Omey Dyer stayed at my place about three months. Then he went on the highway as a foreman. I did not see him at any time during his employment on the highway.

Q. Did you hear the question, Mr. Dyer?

A. Not thoroughly. No, I didn't understand the question?

Q. During the time that he was employed on the highway did you see him at any time?

A. Why, yes, he used to come home Saturdays.

Q. At any other time?

A. When he was sick, he would come home and lay off and then go to work again."

He was employed around Blackfoot something like three years. He left Blackfoot. He came back once after he went to Oregon. I can't call to memory when he came back. He was taken to the Veterans Hospital. He was at my place when he left for the Veterans Hospital. He was at my place when he was taken to the Boise Hospital. He died at Boise.

Certified copy of letters of administration to the witness in the estate of Omey E. Dyer, deceased, admitted in evidence as plaintiff's Exhibit No. 1.

CROSS EXAMINATION

By Mr. Griffin.

I can't hear very well. After Omev came back from the Army he went to work as foreman on the highway. He was working for Mr. Thompson. Mr. Thompson was doing county highway work. Omev Dyer worked for him as foreman all that summer. He was getting 16c more an hour than the rest of the laborers. That continued as long as there was any road building in 1919. In 1920 when the road work opened up again, he went back on the road, same kind of a job. He worked all during 1920 to the best of my knowledge and at the same pay. In 1921, I don't know whether he went back to the same job. I don't recall whether he went back there or whether he went to Oregon. He was still on the highway work as long as he lived there. He went over to Ontario sometime in 1921. I think it was in 1928 when he came back. He came back in the spring. He went to the Veterans Hospital in August.

A. T. SPRINGER, a witness called on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

My name is A. T. Springer. I was in the hardware business. I have lived in the State of Idaho 22 years at Blackfoot, Mackey, and Idaho Falls.

I was acquainted with Omey E. Dyer during his lifetime. I became acquainted with him in 1913. He was living at Blackfoot, before he went into the army.

I saw Omey E. Dyer after his return from the Army. I saw him the day he got off the train when he came back from the army. I could not give the exact date. It was in the year 1918 or 1919 after the Armistice. It was in the spring. He came to my store on Main Street in Blackfoot. That was the day he came back.

“Q. Now, tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. Don't state any conclusions.

A. He was either on crutches or had a cane, I don't remember which to the best of my recollection. He was much lighter in weight than he was when I saw him before he went to the army, his complexion was bad, and he looked like a sick man.

MR. GRIFFIN: I move to strike 'he looked like a sick man', as a conclusion of the witness.

THE COURT: It may be stricken.

MR. GRIFFIN: And the jury be instructed not to regard it.

THE COURT: The jury understands that when any testimony is stricken by the Court they are not to consider it.”

I would say that Mr. Dyer stayed around Blackfoot two or three years after he came home. I am not positive as to the exact time. I saw him during that time.

I noticed that he was pale, and at different times he complained of pains in his stomach. He never regained his weight, the weight he had when I first knew him.

I saw him when he was back in Blackfoot in 1927 or 1928. I noticed that he was pale after he returned from Oregon. He used to have a breaking-out at times around his mouth, sores. He complained of his stomach continually whenever I saw him. I have seen him do work.

One particular time he was down to his father's ranch and he attempted to saw a board in two. He had to stop two or three times during the time he was sawing it due to weakness, or coughing. That was after he returned from Oregon.

I saw him walking around on his father's place. This was after he came back from Oregon. He was weak and short of breath and had to sit down and rest. He would be very short of breath after he walked two or three hundred yards. This condition continued until he left Blackfoot.

CROSS EXAMINATION

By Mr. Griffin.

I would say I saw him after he came back from Oregon 20 times, possibly. I would say I saw him over a period of a couple of years after he came back from Oregon. I can't remember the exact date.

A short time after he returned from the Army, he

went to work on the highway. Then he remained on the highway until he left for Oregon, to the best of my recollection.

REDIRECT EXAMINATION

By Mr. Worthwine

“Q. You don’t know how much he was off while he was on the highway, do you?”

A. I couldn’t answer that question, although I saw him at different times.”

OWEN J. JONES, a witness called on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

My name is Owen J. Jones. I am a farmer by occupation at Blackfoot, Idaho. I have lived in Bingham County twenty-five years.

I was acquainted with Omey E. Dyer before the war. I am not related to him or his father in any way. I saw Omey E. Dyer about a couple of weeks—a few days after he came back.

“Q. And what did you notice about him, if anything at that time. Just tell us the facts, Mr. Jones, we don’t want conclusions.

A. Well, he stooped a little, he was pale. He looked like he was weak.

MR. GRIFFIN: No, just a moment. I object to any conclusions, your Honor.

THE COURT: Sustained."

He moved with a limp, favored his side, and was short of breath.

I was working with him pitching hay when he quit, gave out, he couldn't go on. That was in June after he came back from the army. He started to work in the morning and he lasted about an hour and a half or two hours and quit pitching hay. There was a hay crew out there pitching hay. I was pitching hay on one side of the wagon and he was pitching hay on the other side. He went home, quit.

I saw him again after he returned from Oregon. It was at his father's ranch. His father had a thirty-acre farm.

I noticed he was weak and stooped and was a lot weaker than before he left, pale.

CROSS EXAMINATION

By Mr. Griffin

Omey Dyer stayed around Blackfoot two or three months, something like that, after he came back from the service. I couldn't give the exact date. I was right with him there two or three months, right at home, then he was gone. I saw him from time to time before he went to Oregon. He was working as foreman on the

highway during that time. He was working for the county.

When he came back from the army, he had a cane, if I remember right. He used a cane off and on after that. I recall he had it all the time, not all the time, at the time I would see him at home, he would have a cane with him. This happened from the time he came out of the army until he went on the highway. I didn't see him much during the time he was on the highway. After he went on the highway, I didn't see him with cane or crutches. I would see him home on Sundays.

“Q. Do you know that he would come home off the highway at the end of the week, and stay over the week end at home?”

A. I have seen him more than once.”

WHEREUPON, the deposition of John A. Gardner taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DIRECT EXAMINATION

By Mr. Stone

My name is John Albert Gardner. I am 39 years old. I live at Klamath Falls, Oregon. My occupation is contractor. I was acquainted with Omey E. Dyer practically all of his life time. I first became acquainted with him about the year 1900. I was seven years

old and he was about nine. I was acquainted with him from that time up to the time of his death. I am a brother-in-law of his—he married my wife's sister. Omey Dyer's wife died about a year after he died. They had one child and I have the child. I first became acquainted with Omey Dyer at Mackey, Idaho, and was near or with him practically all of the time from his discharge up until about a year before his death. I saw Omey Dyer in France.

“Q. What was the condition of his health during all the time that you knew him, prior to the war?”

MR. RYDALCH: I object to the question of any condition prior to the War as we are only interested in Omey Dyer's condition from the time of the lapsation of the policy involved in this case.

THE COURT: Sustained.”

I saw Omey Dyer in France during the war. Later I attempted to locate him, but could not find where he was. I did not see him in France after that.

I saw him in August of 1919 after his return from the Army. His physical condition looked to be very poor at that time. He was pale, and he limped when he walked; kind of pulled over to one side.

“Q. How was his weight compared to that before the war, during the war before he was run over by the truck?”

A. He was lighter in weight after he was discharged from the army.”

He had a poor appetite; whether his rest was good or not, I couldn't say.

“Q. State whether or not he appeared to be exhausted?”

A. He did.

MR. RYDOLCH: I object to the type of leading questions.

THE COURT: Sustained.”

He became tired easily upon exertion. He was fond of fishing and hunting before he went to the war, but he did not hunt and fish as much after he came back, though he went hunting and fishing some. He used to engage in sports before he went to the war, but to no great extent. He didn't engage in sports after he got out of the army.

“Q. What was his color, was it healthful, or otherwise, after he got out of the army?”

MR. RYDALCH: Object to the question as a conclusion.

THE COURT: Sustained.”

He appeared to be a sick man. His physical condition became increasingly worse. He wasn't able to work continuously. He would try to work and become sick, might drop helpless right where he was working. I was engaged in work with him. I picked him up several times when he dropped right where he was working.

He was engaged in the contracting business—he and

I contracted together. He would be down sick and be unable to work—be too sick to work. The first time this happened was at Roseburg, Oregon. He took an awful pain in his back and we had to carry him in. He was helpless, sick for some time afterwards.

One of the very same spells happened to him at Hornbrook, California. He would become almost paralyzed; he would drop right where he was working. He seemed to be in great pain. We would have to put him on a stretcher, or cot, or whatever we might be able to get hold of, and carry him home that way.

He had another one of these spells at Chemult, Oregon, in 1927. This time he fell from the scaffold. He was in the hospital about six months.

“Q. Was he able to use a pick and shovel?

A. No.

MR. RYDALCH: Objected to as a conclusion—not whether he was able to, or whether he did.

THE COURT: Sustained.”

He tried to use a pick and shovel, but couldn't do it. He was terribly nervous. He could not do the ordinary tasks that other men could easily perform. I was with him practically all the time after his return from the war with the exception of one year before his death. I lived in the same house with him when we were out in camps, or had business out in the camps. He was sick in bed about one year of the time after he returned from the war, not counting the last year that I wasn't

with him. He was under a doctor's care a fourth of the time.

“Q. What condition, or how was his stomach, did he retain his food when he ate it, or not?”

A. No, he would have had vomiting spells.”

He would have vomiting spells both before and after eating. He vomited blood. He never used alcohol or tobacco in any form. I saw him take a lot of medicine at various times. He walked with a limp and bent over to one side—the right side.

“Q. Was he able to work at any gainful occupation during the time after he came from the war?”

MR. RYDALCH: I object as a conclusion and this witness is not qualified to state whether he was or whether he was not. That is certainly a question for medical testimony.

THE COURT: Sustained.”

He did not appear to be nervous when I saw him in France.

CROSS EXAMINATION

By Mr. Rydalch

I have had Omey Dyer's child about two years—this is the only child. I have not legally adopted this child. I did not serve in the same outfit in the army with Omey Dyer. I first saw him in France in November, 1918. I did not see him again while he was in the army.

The first time I saw him again was August, 1919. There was a weakness in his condition, he was pale and he limpted when he walked. He didn't look like he would weigh over a hundred and thirty-five. He looked about twenty pounds under weight. He weighed about 150 when I saw him in France, and when I saw him in August, 1919, he was about twenty pounds light. I was with him practically all the time after August, 1919, until about a year before his death, and it seemed to me his condition got worse, he got more nervous all the time. He quit work entirely in 1928.

The attack that he had at Roseburg was about September, 1922—that was the first paralytic spell, or whatever you might call it, I saw him have.

The attack at Hornbrook, California, was in 1923, and he had to quit work again at Chemult, Oregon, in 1927, but there were other times between 1923 and 1927, he had to quit work also. It was about every six months he should have went to the hospital or had a doctor's care.

Omey Dyer and I were partners. We were sub-contractors, working under many other contractors. This firm continued about three or four years, from 1923 to 1927. The earnings were divided 50-50. We made about Four Thousand a year—Omey Dyer made about \$2,000 in 1923, 1924, 1925, 1926 and 1927. We made income tax returns in 1926 and 1927. I saw Omey Dyer after he fell off the scaffold in 1926, and when I saw him he was laying down on the ground. I did not

see the accident. I do not know how he hit when he fell. He always complained of his back. The first time I knew of his seeing a doctor after he got out of the army was at Hornbrook in 1923—Dr. Lucas. He went to Portland to some doctors after that, but I don't know their names. Drs. Truax and Hunt treated him when he fell off the scaffold. I believe both before and after the operation for appendicitis by Dr. Hunt.

I am an ex-service man, but have never filed for any compensation or payments from the Government. I knew of the benefits. I don't believe Dyer ever made a claim to the government for this condition he had. He talked of doing it several times. I told Omev Dyer I thought he was more entitled to benefits probably than lots that were getting it.

“Q. Well, did you and he consider his condition serious enough to make those claims back in 1923, 1924, 1925 and 1926, when you were running this partnership?”

A. If it had been me, I would have filed a claim and not tried to work.”

Q. But during those years of 1923 to '27 you have testified he made approximately ten thousand dollars as the result of his copartnership with you on this contract job?

A. Well, the two of us together made that much.

Q. Well, you said he made approximately two thousand dollars a year, did you not, for 1923, '24, '25, '26,

'27. Well, dividing that up, that would be approximately—that is what he received.

A. He received fifty-fifty of all we made.

Q. Well, for the five years, at two thousand dollars a year, he would have received a total of ten thousand dollars for those five years, wouldn't he?

A. Yes, sir; I expect it would probably have amounted to that.

REDIRECT EXAMINATION

By Mr. Stone

“Q. Why did you divide 50-50 with him if he didn't keep up his end of the work?

MR. RYDALCH: I object to that testimony. There is no testimony on direct examination that he didn't keep up his end of the work.

THE COURT: Sustained.”

The partnership finally dissolved because he got down so bad that he had to go under a doctor's care and stay there all the time. He called my attention, thousands of times, to the fact that he wasn't keeping up his end of the work.

Q. And why did your partnership dissolve finally?

A. Well, he got down so bad that he had to go under a doctor's care and stay there all the time.

Q. Did he ever call your attention to the fact that he wasn't keeping up his end of the work.

MR. GRIFFIN: Just a moment. I object on the ground that it is incompetent and hearsay. That calls for what the man said.

THE COURT: Overruled.

A. Yes, he did thousands of times.

Q. And did he want to take half the proceeds.

MR. GRIFFIN: The same objection, your Honor. Whether he wanted to take half of the proceeds called for a conversation or statements.

THE COURT: Overruled.

A. Well, he did not exact half the proceeds.

Q. Why?

MR. GRIFFIN: The same objection, your Honor.

A. He felt like he hadn't earned them.

MR. GRIFFIN: After that answer, I move to strike the answer because it shows obviously it is hearsay.

THE COURT: It is hearsay—what he says he felt like. Sustained. That is purely hearsay.

“MR. WORTHWINE: If your Honor please, at this time I will ask the Clerk to mark as Plaintiff's Exhibit No. “2”, Bulletin No. “1”, and as Exhibit “3”, Regulation No. “11”.

MR. GRIFFIN: Bulletin No. “1” is what exhibit, is that No. “2”?

MR. WORTHWINE: Yes.

MR. GRIFFIN: And Regulation No. '11'?

MR. WORTHWINE: No, '3'.

MR. GRIFFIN: No objection.

THE COURT: Admitted.

MR. WORTHWINE: Regulation No. '11' is relative to the definition of the term total disability, and the determination as to when total disability shall be deemed permanent.

'Treasury Department,
Bureau of War Risk Insurance,
Washington, D. C., March 9, 1918.

'By virtue of the authority conferred in Section '13', of the War Risk Insurance Act the following regulations is issued relative to the definition of the term 'Total disability' and the determination as to when total disability shall be deemed permanent.

'Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed in Article III and IV to be total disability.

'Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue through the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on

the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue.'

'William C. Delanoy,
Director.'

Approved: W. G. McAdoo,
Secretary of the Treasury.'

GEORGE THOMPSON, a witness produced on behalf of the plaintiff, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

I am George Thompson, a laborer by occupation. I live at Blackfoot. I have lived in the State of Idaho twenty-two years. I was acquainted with Omey Dyer during his lifetime. I knew him before he went into the army.

I served in the army at Fort Douglas, Utah. I was in the Medical Corps. I served in the Medical Corps at Fort Douglas, Utah, about 18 months. While I was at Fort Douglas, it was made into a base hospital. The first year I was there, there were troops there, but they

took them all away and made it a hospital. I was a sergeant in the Medical Corps.

I saw Omey Dyer at Fort Douglas. It was along about the first of February. He came back to Fort Douglas with a bunch of convalescents, and I wasn't right in the hospital when they were taken in. I left the morning that Omey Dyer got there, the same day. I left in the morning and he got there about noon. I came back on Sunday evening and saw Omey Dyer on Monday morning. I went up to the hospital and saw him, and he was in bed. He was there in bed, couldn't hardly move. I saw him again that evening about 7 o'clock. He wasn't entirely out from under the influence of ether.

Mr. Dyer stayed there in the hospital about two months after that. I saw him occasionally, and I noticed that his face was all drawn, he was stooped, and he had to go part of the time with crutches. Then towards the last he went with a cane. He complained of his stomach all the time he was there. I saw him about a week before he was discharged from the army, and he was using a cane. I know that he was in the hospital as a patient. I saw him here at Blackfoot after I was discharged from the army. He was able to go without a cane, but he was still limping and still complained of his stomach.

CROSS EXAMINATION

By Mr. Griffin.

I would see Omey Dyer around Blackfoot occasionally. I did not see him out on the highway where they were building highways. My father had charge of some county work.

WESLEY C. THOMPSON, a witness produced on behalf of the plaintiff, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

I am Wesley C. Thompson. I live at Blackfoot, Idaho. I have lived in the State of Idaho 22 years. I was acquainted with Omey E. Dyer. I am not related to him in any way. I became acquainted with him first about 1915.

I saw him first after the war on his father's place southwest of Blackfoot. It was sometime in the fore part of May. I think just the first, the first part of May in 1919.

I noticed that he was drawn over and he walked with a cane and complained quite a bit about his stomach. He worked under me. He went to work for me on the 14th of July, 1919. I was bridge foreman and Omey Dyer was a form builder. He was the boss of the form builders.

I would say he worked under me about half a month before he took sick. He went to work on the 14th and took sick on the 28th. He worked 14 days.

I took him to Dr. Hampton. Dr. Hampton was at Blackfoot. Then he worked off and on some through August. I couldn't give you the exact date. Then he took a foremanship for himself. The man that had charge of the county work came to me and asked me if I didn't think Omev was capable of it, and I told him that he was perfectly, but I said, "He will take sick again." "Well" he said, "we can fix that." Of course, when Omev did take sick he was terribly sick, that is all.

When he took sick, he simply turned pale. He would first get some sores around his mouth, and inside his mouth, and then he would commence vomiting and he would vomit everything out that was in him; then he would get down on his hands and knees and he would vomit up slime and awful looking stuff. I am not in the habit of looking at what a man vomits, but he would get terribly sick. Sometimes he would get over it and the next morning he would go back to work, but I would say that he took sick as much as three times before I took him to a doctor. I think the third time I took him to a doctor.

I think the last time he worked under me was in April, 1921. He was working for me at the time he quit and went to Oregon.

I saw him off and on between the time he went to

work in 1919 and 1921. He did work for me some of the time, that is, not continuously, not even when he wasn't sick. He worked about five months, I think, up in Bonneville County, or he was up there. I don't know how much of the time he was sick. I don't know anything about him any more than that I know he came down from there once sick, and stayed at my place three or four days. When he was at my place, I just observed that he was sick. I noticed that he was pale and weak and that is all practically that I can tell you. I did notice he would take vomiting spells or gagging spells.

“Q. How long did those gagging or vomiting spells last to your knowledge? I mean over what period of time?”

A. Well, it lasted all the time that I knew him after he came out of the army.

Q. And how about his being on the job or off it during the time he was working for you from 1919 to 1921?

A. I couldn't say, but I would say that at the time we were at work he would be off one-fourth of the time with this sickness. I would say about one-fourth. I couldn't tell you exactly.”

I would say I saw him in 20 or 25 spells between 1919 and 1921. I would say that it was that many. It might have been a few more or a few less, but I would say twenty times anyway. Of course not every time he would take a vomiting spell it wouldn't necessarily mean

that he was going to be sick, that is, it would mean he was sick for four or five hours, might go to camp and go to bed and maybe after dinner he would get up and go to work again. Then, other times, he would get those sores in his mouth, then invariably we would have to send him home.

I saw him in the spring of 1927 or 1928. I think he was home here in 1927 before he went to the Veterans Hospital. I think it was a year and four or five months. I saw him at my place and his father's place. Well, I just observed that he was sick, that is all. There was times when I would see him that he was very drawn and stooped, and sometimes he would walk with a cane, and other times he didn't. Once in particular I seen him and his father go out to the barn to milk. He took sick and couldn't milk, and he always complained of his stomach.

CROSS EXAMINATION

By Mr. Griffin.

When I said that I sent him home, I meant by that either to my place or his father's place, either one was home to him. My book does not show when he came back to work after the 28th of August, 1919. I have no record of it. When he came to work after August, 1919, I kept a record, but mislaid the book. This is my time book for July, 1919. My time book shows

that Omev Dyer put in five hours on July 14, 1919, and that is what the other men put in on that day. And on the 15th, 17th, 18th, 19th, 21st, he put in nine hours. I didn't put down the number of hours he worked on the 22nd or 23rd or 24th. On the 25th I changed him from laborer to carpenter. He did just the same work after that. I hired him to oversee the construction form builders. He was a kind of a foreman. His duties were to see that the forms were properly placed and built so that when the men put the concrete in they wouldn't give out. Omev Dyer could read blue prints. He was a very competent workman. I paid him 65c an hour and paid the other men 50c an hour. On the 24th and 25th and 26th, he worked nine hours which is all the time I kept in that book. The other book I lost and couldn't find.

He came back to work for me later, I think it was about a week, and I put him at the same kind of work. That was during August. I haven't any record of how long he worked in August. I know he worked some, but how much I couldn't say. They wanted a foreman for the same kind of job I had. That job paid about 75c an hour and on my recommendation Mr. Dyer was hired by this other man. He would leave my crew, except when he would take sick they would come for my crew, and I would have both crews. In the meantime he was handling a crew of his own just the same as I was. This continued until some time, I think it was the last of April, 1920. I can't remem-

ber when he went up to Bonneville County, and when he was up there I was out of touch with him only when he would come home. He was engaged in Bonneville County in the same occupation.

In the fall of 1920 he came down to Bingham County. He worked under me. He was not a foreman then, I was county roadman and he was working under me. If there was a bridge to be fixed, Omev and I went and looked after it ourselves, together with the other men. I hired and fired on that crew. Omev Dyer was paid 65c an hour and that was more than the other men was getting. This work ran about 3 days a week for the winter, it would average about that. Sometimes a whole week and maybe the next week didn't do anything. It was seasonal work, that is depending on the season and whether the work was there. That is, it was all done that way, except once I remember I went after him and he said he couldn't go, that he was sick. I didn't ask him what way or anything. He just said he couldn't go, he was sick. I think it was twice, but I won't be positive. This continued, I think, up until April, 1921, and then he left Blackfoot and went to Oregon. Mr. Dyer worked for a man by the name of Stone when he was up in Bonneville County. I wasn't in touch with Mr. Dyer from 1921 until he came back in 1927.

ALBERT HOEFFER, a witness produced on behalf of the plaintiff, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine

My name is Albert Hoeffler. I reside at Blackfoot, Idaho. I have lived in Idaho 34 years. My occupation is farming. I was acquainted with Omey E. Dyer. I am not related to him. I remember when Omey Dyer went into the army and I also remember when he came back. I saw him first in the spring of the year. We were putting in crops, and I passed his place, and I saw his father. His father told me that his boy was back, and I stopped and went in to see him. He was sick and could hardly walk around. He favored his side and was pale, weak, I think he used a cane.

I saw him when he came back from Oregon in 1927 or 1928. I noticed at that time that he was exactly as he was when he first came back from the army, only more serious. I saw him try to work in the winter of 1927, I guess it was. I don't remember exactly. He came to my place to get a load of hay with his father. They were loading my hay and I was doing some of the chores, and I happened to look around and Omey Dyer was laying on the hay stack, pale. I asked him what was the matter. He said, "I can't work."

"MR. GRIFFIN: No, just a moment. I object to the statement.

THE COURT: Sustained."

I offered to help him and he laid on the stack until I finished helping load the load. I remember the oc-

casian when he was hauling some fertilizer after he came back from the army. He had to stop and rest. He just couldn't make it. He would work a little while and then he would have to stop, and there was another occasion. This time he was loading hay and he vomited. I also noticed the sores around his mouth.

CROSS EXAMINATION

By Mr. Griffin.

It was in the spring of the year that he got the hay from me. It was in April, I think. I guess it was in 1928. I am not positive whether it was the spring of 1928 or 1927. It was the same year that he went to the hospital in August. I remember when he went to the hospital and he died in May of the next year, and that was after he came back from Oregon.

WHEREUPON, the deposition of BEULAH GARDNER taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DEPOSITION OF BEULAH GARDNER

DIRECT EXAMINATION

By Mr. Stone.

I am 37 years old, and live in Klamath Falls, Oregon. I am a housewife. I was acquainted with Omev Dyer

in his lifetime. I first became acquainted with him about 1921 at Ontario, Oregon. At that time he was foreman for a construction company. He married my sister in 1923. I have charge of the little child that he left—she is fifteen years old.

I didn't see Omev Dyer until after he was discharged. After 1923, I knew him quite well. The first time I saw him, he didn't look to be very strong, and he was nervous and pale, had a bad complexion. Sometimes his appetite was good and other times it wasn't good. When he would be sick, he wouldn't have any appetite at all. For the last three or four years that I saw him, any one would say that he had lost considerable weight. He appeared to be exhausted. He became tired easily when he worked. He did not engage in any social activities to speak of. His color was pale—yellow.

“Q. Did he appear to be a sick man or a well man?”

MR. RYDALCH: Object to that question as leading, and further more as conclusion of the witness. She could state how he appeared to her.

THE COURT: Sustained.”

His physical condition became worse, he was just so he was shaky. Part of the time he did light work. He worked not more than one-half of the time, if he worked that much. I have seen him lots of times when he tried to work and couldn't.

When they were working at Chemult, he would come in completely exhausted, and when they were working

out here on the dam, I don't know just what year that was, on the highway to Bly, he would get completely out and be sick in bed for days.

I would say he was sick in bed close to eighteen months after he returned from the war. He was in bed at home lots of times. He was under the doctors' care possibly about a year. I saw him taking medicine. I have seen him vomit—he would vomit blood. I saw him have one of his spells when he would fall down at Chemult, and his legs and hands shook. Even though he wasn't right in one of those spells, he would be that way, so he couldn't hardly stand, he would shake so. He walked like an old man, he seemed to be lame. When he was sick he always complained of his back and his stomach.

CROSS EXAMINATION

By Mr. Rydalch.

I met Omey Dyer in July or August of 1921. He was then working as foreman on construction work, highway work, culverts and bridges at Ontario. He worked there a couple of months; I believe until that particular job was completed there; he married my sister in 1923. Omey Dyer and his wife after their marriage lived in camps when they were working, and the bills were all put in together and paid. His wife wasn't working, but the bills was paid before the money was divided up. They lived in camps all the time and

Mr. Dyer supported her. It was contract work. I was at Roseburg when Mr. Dyer had the first so-called spell, but I didn't see him in that one and I know of none he had before that. His condition after I knew him in 1921 grew worse. He finally had to quit work. He was in the partnership up to 1927, and my husband's recollection of his gross earnings from 1923 to 1927 was approximately correct.

“Q. Would you state that your husband's remembrance also of Mr. Dyer's gross earnings were the same, two thousand dollars for those five years?”

A. Well, they divided the money that way.”

His condition, after I knew him in 1921, grew worse. After the dissolution of the partnership, Mr. Dyer didn't do any work, he wasn't able to do anything. His father had a little place in Blackfoot, so he just went back there to live and stay with his family. He was in the hospital at Boise for nine months, or seven months—that is where he died.

WHEREUPON the deposition of C. A. DUNN taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DEPOSITION OF C. A. DUNN
DIRECT EXAMINATION

By Mr. Stone.

My name is C. A. Dunn. I am 43 years old—live in

Klamath Falls, Oregon. My occupation is contractor. I was acquainted with Omey Dyer in his lifetime—an not related to him in any way. I first became acquainted with him in Klamath Falls in the fall of 1922.

I was associated with him until about a year before he died. In the spring of 1923 he went to work for us. He was associated with John Gardner when he was working under contract. He was working as subcontractor. He always had a limp—not so much of a limp, but he leaned a little sideways. He kind of pulled over to one side like he was in misery—I think his right side. He was always that way, sometimes worse than others. I never knew anything about his stomach. He was never in good health from the time I knew him. I did not know him before he went to the war. He complained of his stomach. He told me about his injury, and at the time he didn't take it very seriously.

He was the most cantankerous man I ever saw. I will say this, that I never cared for him. It was probably his physical condition—he was always looking for a quarrel. He couldn't get along with anybody. I don't see how his partner ever got along with him.

“Q. Well, his being personally obnoxious, did you attribute that to his nervousness?”

A. I did.”

He quarreled not only with the fellows around him, but the inspectors. That is what gave us the most trouble, his quarreling with the inspectors. He seemed to be, as I look back upon it, I imagine he was in misery

like a man that has kidney trouble. He may have always been that way. His face was drawn, he sometimes looked like a corpse. He never could stand very much physical work. He wasn't on the work all the time, but his partner was, and it was on account of his partner that the contract was kept up, and we probably wouldn't have signed the contract if it hadn't been for his partner. He became tired easily upon exertion and he couldn't stand but just a little work.

He did not engage in any kind of social activities that I knew of. I never knew him to do anything outside of his work, such as outdoor sports, baseball, etc; he wasn't able to work continuously. He was off the job quite often. I have no record of how much, but quite a lot. He was always sick. In fact he kept growing gradually worse after he went to work, and we thought two or three times he would never come back to work, but he did. His physical condition became worse. He worked half the time, I guess, possibly a little more or less. You couldn't be very accurate on that.

He did some physical labor, but he couldn't do it continuously. He was a very efficient workman when he could work. He had to limit himself very carefully to the things that were essential. He was the only man on the job that could do certain things. His partner handled the men, principally, and did all the work when he wasn't there, and looked after the business in a general way.

He was in the hospital part of the time, and I am quite sure he was under a doctor's care. Many, many times he was forced to leave the job and go home sick. I couldn't give any particular time because it's a long time ago. He worked on numerous jobs for us too. I never saw him vomit. He was continually complaining of his back and side. It seemed when he was here that that was all the matter with him. They decided it was his appendix that was causing the trouble, and they cut it out, but it didn't help him, didn't do any good at all. I don't know how his appetite was. He complained of his stomach in connection with this injury, but I was never around him much when he was eating. He ate at our cook house some, but I never noticed.

CROSS EXAMINATION

By Mr. Rydalch.

I first became acquainted with him in the fall of 1922. He and Gardner had a number of subcontracts with me. They started in 1923 and worked for us, I believe, every year—most years until he left there. They had one or two contracts not with us, but they were short duration. I am not sure when he left. I think it was 1928, but it may have been 1927. They were doing principally concrete work, putting head walls on culverts, building box culverts and bridges. He worked at this subcontracting work about five years.

I generally saw him once a day, but sometimes I didn't, it would be a week before I would see him—I came in contact with him purely in a supervisory capacity. I saw him most every day but sometimes a superintendent on the job doesn't go over it each day. I couldn't tell whether he worked an entire day or not.

Mr. Dyer and Mr. Garner always had some men working for them. I don't know what their maximum would be, but I imagine it would vary between five and twenty, somewhere along there. Like most contractors, they tried to do the skilled jobs—the ones that require special skill and high priced labor. I remember him getting hurt a little, but I don't remember what he was doing at this time. They operated on him for appendicitis at the hospital. His condition gradually got worse. They dissolved the partnership because he couldn't longer hold up his end of the work. In fact, the last year, I think it was rather a heavy burden on the other fellow, but up to that time they had carried on the sub-contract.

He gradually grew worse and worse. I imagine the fact that he was a brother-in-law, had a lot to do with his being a partner. He never was entirely holding his end up. Probably the fact that he was very skilled in carpentry, cutting difficult angles and things of that kind helped to hold them together too. At least he had a spark of knowledge there that was worth while, outside of his ability to work. I couldn't say how long he was under the care of doctors. I would know if he was

off for any extended length of time. He could be off part of the day and I wouldn't know. I couldn't give any definite dates of extended periods when he was off.

I would say he was off work from time to time, sometimes as much as two or three weeks, he would be gone, and I don't think he always went to the hospital, sometimes he stayed at home. They had two subcontracts under other general contractors, but most of that five years they were subcontracting under me.

WHEREUPON the deposition of DR. WARREN C. HUNT taken at Klamath Falls, Oregon, on the 11th day of February, 1932, a witness on behalf of the plaintiff was read in evidence.

DEPOSITION OF DR. WARREN C. HUNT
DIRECT EXAMINATION

By Mr. Stone.

My name is Warren Coe Hunt. I am 42 years old. I reside at 647 Pacific Terrace, Klamath Falls, Oregon. I am a physician and surgeon. I have been licensed to practice medicine 21 years. I am a graduate of Starling Ohio Medical College in Columbus, Ohio. I am licensed to practice my profession in Ohio and Oregon. I have practiced in Oregon for 21 years—in Klamath Falls.

I was acquainted with Omey E. Dyer during his lifetime, and became acquainted with him when he came

to my office for treatment. The first time I treated him was at the time of his application at my office, February 20, 1926, and for several months subsequent to that time I treated him.

At that time, he gave me a history of his trouble. His history was that of long standing nervous difficulty and dating from his war service, wherein he had been injured in that service. His back and chest had been injured and he had been unable to work steadily since that time, since he had been mustered out. The immediate difficulty for which he came for treatment at that time, however, was nervous unrest, and upon examination, I found that he had a difficulty with his gums, pyorrhea notably, and general nervous debility. He also stated that he had been run over by a truck, which caused the injury.

Afterwards I operated on him for acute appendicitis, and at that time found extensive intestinal adhesions, and he was also suffering from hyperacidity and chronic indigestion. The internal difficulty may have been occasioned by his injury in 1918. He was pale, anemic and weak, and highly nervous.

I prescribed appropriate treatment for his mouth condition and indigestion, administration of an iron preparation for his anemia, sedatives for his nervous condition, and tonic treatment.

He was under my care for a period of about six months. I performed an operation for acute appendicitis. As to whether or not the condition of acute ap-

pendicitis might have been brought about by his being run over by a truck, that is hard to say. The condition of bowel stasis induced by adhesions that have been the result of an internal injury, may well have brought about a predisposition to appendicitis.

During the time that I knew him he was able to work continuously very little of the time, owing to his weakness and general debility.

At the time I first treated Omey E. Dyer he was totally disabled within the following definition:

“Total disability is that condition of mind or body, which renders it impossible for the disabled person to follow continuously any substantially gainful occupation.”

for the reasons already given. He also suffered from recurrent gastritis. The medicine I gave him seemed to improve him for short periods, and then he would relapse again. The man would take ill again with some new pain or ache.

He was stooped, but not lame. The stooping was caused by debility, weakness, and other difficulty, pain in his back and abdomen, and a general condition of exhaustion. The man was undernourished, he was thin and anemic and weak, and as a consequence his carriage was stooped.

CROSS EXAMINATION

By Mr. Rydalch.

I do not specialize in any branch of my profession,

but I am more of a surgeon than otherwise since eighty per cent of my work or income is surgical, which has entitled me to a fellowship in the American College of Surgeons since 1927.

Omey Dyer's first application for treatment from me was February 20, 1926. When he came to my office he was complaining of weakness, general debility and a highly nervous condition. Upon examination the patient had gingivitis, or an infected condition of the gums, of a serious nature. I gave him a complete physical examination which consisted of an inspection of the patient, and clinical observation of his entire body.

I found a marked anemia, evidences of malnutrition and underweight. Apart from sending him to a dentist to have the necks of his teeth scraped and polished and whatever local treatment the dentist was able to give, he was given arsenical preparations intravenously, namely, neo salvarsan and Ferric Cacodyllate.

This Neo Salvarsan was given to him as a specific for the type of gingivitis which appeared in the patient, that is, the type in which the streptothrix is present. That means that this condition of the gums is exuding a pus or poison, into the system, both by local absorption and by being taken into the alimentary tract, and this pus and poison going into the alimentary tract, sets up an inflammation or irritation, somewhere, and causes a man to get sick.

Appendicitis is caused by the localization of an in-

inflammatory condition of the alimentary tract, by streptococci, staphylococci, but is more commonly introduced by a superactivity of the colon bacillus. Appendicitis may be caused by any trauma wherein through adhesions, a sluggish circulation is brought about through the alimentary canal or bowel tract, particularly in the neighborhood of the appendix.

In my experience, it is very uncommon that pyorrhea may be assigned as a cause of appendicitis. It is possible that it would set up an irritation in the alimentary canal that would bring on the acute appendicitis, but in my experience that has not been common.

It is unlikely that the type of pyorrhea or gingivitis may have been the cause of the incidence of acute appendicitis in Mr. Dyer, and his later record show that the type of infection presented by Mr. Dyer will cause an attack of acute appendicitis, acute appendicitis being more commonly caused by an aggregation of unusual multiplication of the organisms before mentioned, streptococci, staphylococci and colon bacilli.

His nervous condition and his anemic appearance could have resulted from the bad condition of the gums and the inflamed appendix. The gingivitis was a sufficient cause. However, the fact that Mr. Dyer's history was one of rather long standing debility, it is unlikely if the pyorrhea was the entire cause of his systemic weakness. By history I mean what he told me.

I operated on Mr. Dyer for appendicitis August 2, 1926. Mr. Dyer entered the hospital July 28, 1926,

as the result of an accident while working for Gardner & Dyer on the highway near Fort Klamath, Oregon. The accident was one where Mr. Dyer had been thrown off a plank or scaffolding while attempting to wheel a wheelbarrow of concrete. While in the hospital, Mr. Dyer developed symptoms of appendicitis, necessitating the operation of August 2, 1926.

Aside from superficial cuts and bruises, the patient had a sprained shoulder and back as a result of this accident. The usual examination was made for internal injuries. My recollection is that he fell a distance of about six feet off this scaffold.

When I operated I found very extensive adhesions. I left these alone. I tried not to bring about any more than already existed, since no vicious bands of adhesions were present—that means immediately troublesome. They were not of such importance that I had to operate. The adhesions were of long standing and could not have resulted from the fall with the concrete.

General systemic debility prevented him from going back and working the same as he had before this injury by falling off the scaffold. The man was highly nervous, restless, sleepless and could stand no physical exertion. Apparently the physical condition of Mr. Dyer prohibited his working at physical labor and his general nervous condition would not permit him to undertake mental effort of any consequential kind—that is, permit him to work at any gainful occupation. It is a fact that he drew several months compensation from the

Mutual Benefit & Health & Accident Association, at that time. I cannot recollect when I last treated Mr. Dyer, or examined him.

I never saw Mr. Dyer when he was capable of any sustained effort either mental or physical on account of his general physical weakness as evidenced by anemia, accompanied by rapid, weak pulse. His condition improved, but not sufficient to permit his return to any useful work. He was very conscientious in following any directions given him.

“Q. Doctor, don't you think that this fall off the scaffold had about as much to do with his condition after that, as anything, regardless of what he told you of his history?

A. No, I do not. Mr. Dyer should never have attempted physical labor.”

Mr. Dyer had had acute appendicitis arising after nearly a week's rest in a hospital. It is a likely supposition that this period of enforced rest incidental to his injuries, supplemented the already sluggish condition of his bowel activity and encouraged the acute attack of appendicitis.

“Q. How long prior to this hospitalization, Doctor, would you say that he shouldn't have followed this hard manual labor?

A. Never in my acquaintance with the man.”

It is true that his attempt to wheel a wheelbarrow of concrete was beyond his ability, but just what he might have applied his energies to in any sustained

way, I do not know. From the time of his application at my office he was never capable of prolonged effort; I am not sure whether I took any x-ray picture.

“Q. You stated, doctor, didn’t you, that he claimed he had been run over by a truck at one time?”

A. Yes.

Q. Well, if you didn’t make a check on those alleged traumatic injuries, wasn’t it your opinion that this acute appendicitis was caused from some inflammatory condition, and not resulting from any trauma either old or when he fell off the scaffold?

A. The appendicitis was the result of a localization of a general infection of the alimentary tract, super-induced by a sluggish circulation through that portion of the bowel, and very likely contributed to by the patient’s enforced rest in bed.”

REDIRECT EXAMINATION

By Mr. Stone.

Pyorrhea is more likely to attack a person of low vitality than it is a healthy person.

This general systemic debility continued after the operation for appendicitis. And this condition of systemic debility continued after the operation for appendicitis; he did not seem to improve generally in a satisfactory way, after the operation, although the operation in which the appendix was removed healed kindly.

DR. J. O. HAMPTON, a witness called on behalf of the plaintiff, after having been first duly sworn, on oath testified as follows:

DIRECT EXAMINATION

By Mr. Worthwine.

My name is J. O. Hampton. I am a physician and surgeon by profession. I am practicing at Blackfoot.

“Q. How long have you been engaged in the practice of your profession?”

MR. GRIFFIN: His qualifications will be admitted, Mr. Worthwine.”

I was acquainted with Omey E. Dyer during his lifetime. The first time I saw him was on the 28th day of July, 1919, I believe. He came to my office as a patient for treatment, for examination and treatment. The relationship of physician and patient existed between himself and myself at that time. That was the first time that I saw him, when he came to my office. I saw him the first time on the 28th day of July and I saw him quite often off and on during that year, and quite often after that, I believe it was up to about 1921.

I saw him again in 1927. I saw him at different times during 1927 and 1928, up until, in fact, I sent him to Boise at the hospital.

At the time of my treatment of him in 1919, I took a history from Mr. Dyer. He gave a history of being injured in France, run over by a truck through here

(indicating), over the stomach that way (indicating).

“Q. What was the trouble with him. Just tell the jury what you found at the time you examined him and treated him in 1919 and 1921?”

A. Well, he came to my office. He was weak and in a debilitated condition. In fact, very anemic and very thin, and he walked in a stooped position, complaining of a good deal of pain in the stomach and epigastric region and back. He vomited, you might say, incessantly. Everything he ate at that time he vomited, couldn't retain anything on his stomach.

Q. What, in your opinion, was the cause of this condition that you found?

A. I made a physical examination, went over him as carefully as I could and found that he had what we call a gastropptosis, a dropping down of the stomach and intestines.

Q. What was the effect on Mr. Dyer of that dropping down of the stomach and intestines?

A. It was as I repeated before, just those symptoms that I gave you—is what is, in my estimation, that injury and that dropping of the stomach caused those symptoms.

Q. How did that affect his digestion? What was the cause of the vomiting, Doctor?

A. The stomach dropped down there, and of course the digestion is poor—in fact, there isn't any; just lays there and doesn't digest, gets sour and putrid. There is no peristaltic action to speak of and after awhile it

gets sour and is ejected from the stomach, vomited up.

Q. And would being run over by a truck, in your opinion, as he gave you in his history, be sufficient to cause that condition?

A. Yes.

Q. In your opinion did it cause it?

A. Yes.

Q. Doctor, I will ask you to state whether or not in your opinion, Omey E. Dyer was totally and permanently disabled at the time you saw him in 1919, within the following definition: Total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue through the life of the person suffering from it?

A. Yes, sir. He was totally disabled. In my estimation he was totally disabled.

Q. Was he permanently disabled?

A. Total and permanent, in my estimation.

Q. Did you treat him in 1927 and 1928?

A. Yes.

Q. Did you prescribe for him?

A. Yes.

Q. And you were his attending—were you his attending physician during that period of 1927 and 1928?

A. I don't know whether there was any other physician saw him or not, but I did quite often.

Q. I will ask you to state whether or not—from what he was suffering at that time, what was it you found?

A. The same condition that I found the first time I examined him, only it was aggravated worse.

Q. I will ask you to state whether or not when you examined him, or treated him, in 1927 and 1928, he was totally disabled within the meaning of the definition of total disability, total disability being defined as that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation?

A. Yes, sir.

Q. And was his condition such that—I will ask you whether or not he was permanently disabled, or not, at the time?

A. I consider so.

Q. And within the definition was he totally and permanently disabled in your opinion?

A. Yes.

Q. And in your opinion was the injury by the truck the cause of his condition at that time, in 1927 and 1928?

A. Yes.

Q. Doctor, I will ask you to assume the following facts: That prior to the war, or upon the fifth day of August, 1918, Omey E. Dyer entered the United States

Army, and that he was seen in France in November, 1918, by one of the witnesses in this case; that another of the witnesses saw him in the hospital at Fort Douglas down at Salt Lake beginning in February, 1919, and that he remained in that hospital for about two months; and that he was discharged on the twenty-fifth day of April, 1919; that at the time he was in the hospital at Camp Logan, or rather, at Fort Douglas at Salt Lake he was seen by a witness to be coming out from under the influence of ether, that thereafter and before he left he walked sometimes with crutches and sometimes with a cane and was seen to limp; that he returned to Blackfoot in April or May, 1919, and when he arrived in Blackfoot, or after his arrival in Blackfoot at that time in 1919 he was walking with a cane; that he appeared thin and pale, and complained of pains in his back, and that he had a history of vomiting from the time of his, about the time of his return from the United States army up until the time he left for the hospital in 1928, and that he died in the Boise hospital on May 1st, 1929, I will ask you—and you can assume that he attempted some jobs about his father's place in 1919 and again in 1928 and 1929; one of the jobs he attempted in 1919 was to help put up some hay and he lasted about an hour and a half when he left the work and went to the house; that on the fourteenth day of July he went to work under Mr. Wesley C. Thompson and he worked then until Wesley C. Thompson took him from his work to your office at the time

you came in contact with him, and that he worked from time to time for Bingham County and some for a man by the name of Clark, I believe, up in Bonneville County up until some time in 1921, during which time you were seeing him as you testified from time to time; that about 1921 he left Idaho and went to Oregon; that he became associated with one John A. Gardner in the contracting business; that Mr. Gardner was with him from some time in August, 1919 until 1927 or 1928, and that during that time the witnesses saw him, one of the witnesses estimating he was sick in bed or in the hospital, a year and another eighteen months, and witnesses have estimated he was off his work one fourth to half the time until he came back to Idaho when you saw him; and that the testimony is that during the year 1923 to 1927 he and Mr. Gardner while engaged in contract work, that the partnership made about four thousand dollars a year, and that Mr. Dyer was paid one-half of it; the evidence of one of the witnesses is that—one of the general contractors who were letting subcontracts to Mr. Gardner and to Mr. Dyer was that were it not for Mr. Gardner he wouldn't have given them any contracts, and Mr. Dunn, the general contractor who let the contract to Mr. Gardner and Mr. Dyer, testified that during the time he knew him from 1923 to 1927 he had—he walked a little over sideways and pulled to one side like he was in misery, and that he was sometimes worse than others, and that he was never in good health from the time Mr. Dunn knew

him, that he complained of his stomach, that he was a cantankerous man and that Mr. Dunn never cared for him, probably that was on account of his physical condition, that he seemed to be looking for a quarrel, and his face was drawn and he sometimes looked like a corpse; that he never could stand very much physical work, and he wasn't on the work all the time but his partner was, and that it was on account of his partner that the contract was kept; and that he tired easily on exertion and couldn't stand but just a little work; that he was off the job quite often and always sick, kept growing gradually worse after he went to work, and his estimate is that he worked half of the time, probably a little more or a little less, that he did some physical labor but he couldn't do it continuously; that his partner Mr. Gardner handled the men principally and did all of the work when he, Mr. Dyer, was not there, and looked after the job and business in a general way; and you can assume in 1926 he came to Dr. Warren C. Hunt, who testified in this case; that he found Mr. Dyer suffering from adhesions and general debility, and that he operated him some time in August, 1926, for appendicitis, and while he recovered from the appendicitis, that his condition was marked anemic and evidence of malnutrition and underweight continued, and the doctor testified he gave him—or prescribed for him certain specifics for his condition; and assuming the facts, Doctor, that you have testified to that you found yourself during these two periods of time that you examined

and treated Mr. Dyer, I will ask you to state whether or not, in your opinion, within the definition of total and permanent disability, that we have used here, which is that total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain it will continue throughout the life of the person suffering from it, whether, in your opinion, within that definition Mr. Dyer was totally and permanently disabled at the time of his discharge from the United States army on the twenty-fifth day of April, 1919?

MR. GRIFFIN: Just a moment. That is objected to, your Honor, because it takes into consideration the doctor's own diagnosis which was based upon a history not proven, that he was run over by a truck and it also omits the findings of Dr. Hunt in 1926 which show a principal condition of pyorrhea, and shows no findings of a dropped stomach or gastroptosis—is that it, Doctor?

A. Gastroptosis.

MR. GRIFFIN: It omits reference to the fact that this man was earning sixty-five cents per hour in 1919, and seventy-five cents an hour part of the time, being from fifteen to twenty cents an hour more than the other men were earning, and such record as we have shows he was working nine hours a day. It omits the

fact that in 1920 he was earning seventy-five to sixty-five cents an hour doing work as foreman in cement contracting work; it omits the fact Mr. Dunn says he saw him every day and never saw him vomit from 1923 to 1928; it omits the fact that in 1926 he fell from a scaffold while wheeling a wheelbarrow of cement and was injured in his back and shoulders; it omits the fact Mr. Gardner, his partner, first saw him have a spell in 1923, and two others up to 1927. I think that is all, your Honor, that he earned two thousand dollars a year working for the period of time—during that period that Mr. Dunn said he was working and Mr. Gardner said he was working, nevertheless his income was two thousand dollars a year from 1923 to 1927, inclusive.

MR. WORTHWINE: I stated, I think, that the testimony was as to that earning, that it was paid to him for the partnership, I included that in my question, your Honor.

THE COURT: What do you say to the other objections?

MR. WORTHWINE: They may be incorporated.

Q. (Mr. Worthwine.) Doctor, did you hear Mr. Griffin's statement of facts that should be added—that Mr. Griffin the attorney just made?

A. Yes, sir.

THE COURT: You also objected to the doctor assuming some facts that he received at the time he made the examination that was not in evidence. Counsel objects to that.

MR. WORTHWINE: That is in evidence, that is part of it because—

THE COURT: Counsel says it isn't.

MR. GRIFFIN: There is no evidence of that except the doctor said this man told him.

MR. WORTHWINE: That was given to him.

MR. GRIFFIN: That isn't—there is no proof of that. There is no proof that he was ever run over at any time by a truck. He told the doctor he was but that doesn't make it proof of the fact. It is admissible for the doctor to state that because it is history but that doesn't make—but before the doctor can give his opinion based upon that, outside of his treatment, it must be proven as a fact in the case. The mere fact that the man told him he had been so is no proof that he had been in fact, and the very basis of your opinion falls when you haven't proof of the fact.

MR. WORTHWINE: There is evidence in the record unobjected to that he was run over by a truck.

THE COURT: Where, point it out?

MR. WORTHWINE: Why the history he gave Dr. Hunt your Honor.

MR. GRIFFIN: It is just history, nothing but hearsay history given to the doctor for the purpose of diagnosis. That doesn't prove it as a fact.

THE COURT: That doesn't prove it occurred, just because he stated it occurred.

MR. WORTHWINE: Well, if your Honor

please, when a fact is in evidence it is in evidence for all purposes.

MR. GRIFFIN: It is permitted in evidence—peculiarly in the case of a doctor's testimony it is admitted, not because it is true, or not because it is assumed to be true, but because the doctor is entitled to give his diagnosis based on what the patient told him, as well as his physical findings but that doesn't mean in a law suit that it is any proof at all of the fact that he was run over. It is merely proof of the fact he told the doctor that he was run over.

THE COURT: That is as far as it could go. There is no proof here that he was run over by a truck. Unless you can show that there is some evidence here, other than the statement of Mr. Dyer.

MR. WORTHWINE: It is in evidence unobjected to, if your Honor please.

THE COURT: How.

MR. WORTHWINE: It is given in the history—given to Dr. Hunt, there is no objection to it.

MR. GRIFFIN: We did object to it, as a matter of fact, and your Honor ruled it was history and couldn't be objected to.

MR. WORTHWINE: I take it, your Honor, when a fact is in evidence it is in evidence for all purposes. Your Honor, the situation is this: We don't have, although a long time ago we made demand for it, the official record of this man while in the army. That has not been supplied and of course the man it

happened to is dead, and we have—it is in evidence as a part of this man's history. Why is that admissible? Because of this theory: When the man went to the doctor—and it is an exception to the hearsay rule—for treatment and not for testimony, of course that was in the mind of neither of them, having the doctor testify, that he told him the truth. That has the presumption of truth just the same as any other exception to the hearsay rule and it is in evidence, and that is a fact that the doctor has a right to take into consideration. It is one of the facts in the case. We would not have to have in this case now what counsel is contending, that we would have to have somebody that saw this man injured. That is what he has in mind. That isn't it at all. The statement has verity because it was given to the doctor—to the two of them, for that matter—when they were seeking treatment and that is all, that is why we have a right to assume that that fact exists.

THE COURT: As I understand the question, the difficulty here is that in this question you made the statement that this actually occurred, whereas, if you would modify your question—

MR. WORTHWINE: Yes, your Honor, I will do that.

THE COURT: Here you should limit it to what the patient told the doctor. The history of the case, based on that and not as a fact that has been established in the case by proof.

MR. GRIFFIN: May I make this suggestion,

your Honor: He is asking a hypothetical question, he is not asking this doctor what he found or anything he knows. He is asking for his opinion and he is stating as an assumed fact in that opinion, not only certain things but—

THE COURT: I think I can save time with this witness. Before he can answer, you will have to modify the question in this way: The doctor may assume the patient, if he did give a history to him, included in his history that he met with an accident and that a truck ran over him. That he told the doctor that, not that it has been proven, and he may consider it in that way, as a part of the history in the case he gave to the doctor, if he did state to the doctor that he was run over by a truck in the service in France, but not to assume the fact that has been proven other than what the patient told you as a part of the history of the case. With that modification I will permit him to answer.

Q. (Mr. Worthwine.) Now doctor, do you understand the question?

A. Yes, sir.

Q. You are not to assume as an actual absolute fact that he was run over by a truck, but you can assume that he gave you the history of it?

A. And answer on the history he gave me?

THE COURT: Yes.

A. I do.

Q. (Mr. Worthwine.) You say you do—

MR. GRIFFIN: With that modification may I have the same objection, your Honor, so I may preserve my record?

THE COURT: Yes you can have the same objection and it is overruled.

Q. You say you do. You say he was totally and permanently disabled at the time of his discharge, within that definition?

A. Yes, sir.

Q. And what in your opinion was the cause of his total and permanent disability?

A. According to his history, what he gave me, as being crushed by the truck.

Q. And what evidences, doctor, of an injury of some kind did you find?

A. In giving him a thorough examination I found his stomach and intestines down low, down in the hypogastric region.

Q. In your opinion was that caused by some injury?

A. Yes sir—it was exaggerated more than a common type of gastro-enteroptosis.

Q. How far down in your opinion was the stomach?

A. Down in the hypogastrium—down below where it belongs.

Q. Doctor in your opinion, under this history I have read is it your opinion he continued to be totally and permanently disabled up to the time of his death?

A. Yes.

Q. And the cause of that continuance was the same thing?

A. Yes, the same thing.

Q. Doctor what in your opinion, in the history I gave including his working, what was the effect on Omey E. Dyer, of his attempts to carry on the work he did?

A. I beg your pardon?

Q. What was the effect on his health?

A. If he tried work it made this condition worse. Any mental or physical work of any kind would aggravate the condition.

Q. What would be the effect, in your opinion, of his walking and moving around?

A. The extent. It would bring on this condition again, this vomiting and pain.

MR. WORTHWINE: You may cross examine.

CROSS EXAMINATION

By Mr. Griffin.

Q. You date this trouble then, from this supposed being run over by a truck, whenever that happened?

A. According to his history.

Q. That is what you date it from in your opinion?

A. I haven't any other way of dating it.

Q. And you don't know when it happened?

A. No sir.

Q. And you don't know whether it ever happened, do you?

A. Only according to his own statement.

Q. And you are simply assuming that is a fact?

A. Yes.

Q. And your whole opinion is based upon that being a fact, in fact?

A. On his history and my examination.

Q. Yes, that is a material factor is it not, in your determination you made an answer to this hypothetical question?

A. That is the way I take it.

Q. And if it was out of the question and wasn't a fact and hasn't been proved as a fact, then there wouldn't be any way for you to date when the trouble started, would there?

A. I wouldn't give any date.

Q. No. And you don't know what he was down there in the hospital at Fort Douglas for, do you?

A. I didn't know he was there, sir, before he came to me.

Q. You don't know whether they found any condition such as you found, or didn't find any such condition do you?

A. No sir.

Q. You are not interested in what their findings might be in order to make up your mind?

A. Yes, I am interested in the other doctor's findings, yes.

Q. You don't think you need it though?

A. How is that?

Q. You don't think you need it?

A. We all need help, we doctors.

Q. Well Doctor, what did you do for this condition you found here in July, 1919?

A. When I found this—when he came to my office?

Q. Yes?

A. I put him on a light diet, very little liquids, and used a belt.

Q. Yes?

A. An elastic belt to hold up his stomach.

Q. What did you do that for?

A. Why did I do it?

Q. Yes?

A. That was a proper method of treatment in my estimation.

Q. What would be the result of that treatment? What did you expect to attain with that?

A. Temporary relief.

Q. What did you do for permanent relief?

A. I didn't consider there would be any permanent relief in that man's condition.

Q. You thought he would always suffer from gastroptosis?

A. Or gastro-enteroptosis, either one.

Q. Which did you think he had?

A. He had both.

Q. He had both?

A. Yes sir.

Q. When you gave him this belt, what was the effect?

A. Temporary relief when he would wear it and lay off work.

Q. He wore it and worked, as a matter of fact, didn't he?

A. Some, I think.

Q. You knew what kind of work he was doing, didn't you?

A. Some of the time, yes.

Q. What kind of work was he doing?

A. As has been stated here he was working—I don't think he was doing any heavy work or anything of that kind—just around working—some for the county, I think. Of course it was none of my business what he was working at.

Q. You knew during the time you were treating him that in fact he was working?

A. Yes; and I tried to keep him from it.

Q. But he continued to work did he?

A. Some of the time.

Q. Did you consider at that time sixty-five cents an hour for nine hours a day was a gainful occupation.

A. I didn't know what he was getting at all.

Q. Would you consider that as a gainful occupation?

A. Yes if steady I would.

Q. Would you consider seventy-five cents an hour a gainful occupation?

A. Yes, I would.

Q. And if the testimony is here that he worked during the season of 1919, after July 14th, after being out about a week while you were treating him, he came back in August after about a week and continued to work at sixty-five cents an hour, that he was recommended by his employer at that time as competent and able to carry on the work of general foreman for cement work, culvert building,—I mean form work, form building, that he was hired by another man as general foreman, and continued in that man's employ up until some time in 1920 I believe, and then returned to the first man who employed him again at sixty-five cents an hour up until March or April, 1921, and that this man was working about the same times the general foreman who employed him worked, and it was work in the winter, would you consider he had been following a gainful occupation?

A. Part of the time yes.

Q. And then, doctor, if you assume after he left Idaho in the spring of 1921 that he went over to Oregon where he was foreman under a contractor there in the same class of work, and continued that work in 1921, 1922 and 1923, went into a partnership of sub-contracting of the same kind of work and from 1923—in 1923, 1924, 1925, 1926 and 1927 he was living in camps and the expenses would be taken out, the living

expenses would be taken out, and at the end of the year they would divide up, he and his partner, two thousand dollars for each of them during each of those years, would you consider he had been gainfully occupied?

A. Probably part of the time. If that was—if that was all of the time I would consider it so.

Q. Well let's assume he only worked half of the time, or less, but that as a result of the work he did do he earned two thousand dollars plus some of his living expenses, do you think he would be in a gainful occupation?

A. To a certain extent, yes.

Q. What do you mean by a certain extent, doctor?

A. Well, he only worked part of the time. Of course that was after my time taking care of him, and I don't know anything about that.

Q. But you have been testifying on this history that has been given. I want to get your idea of what you think gainful. Do you think if a man makes two thousand dollars a year and works only six months he has been engaged in a substantially gainful occupation?

A. That is out of my line.

Q. I want to get your reaction because you said he wasn't able to follow a gainful occupation. You must have some idea what a gainful occupation is?

A. I still say he shouldn't have. He is a man that had a lot of nerve and energy, and tried to do when he really wasn't able to do—when he should have been in bed.

Q. This is a condition which would increase, wouldn't it—get worse as time went on?

A. Yes.

Q. And finally reach a stage, would it, doctor, when of course a man would be flat on his back?

A. It leads into other things, a lot of complications.

Q. Now when you speak of total and permanent disability within this definition do you have in mind a man is totally and permanently disabled when the disease starts which results finally in—either in his death or in his inability to continue?

A. I didn't get that.

Q. Do you date his total disability within that definition from the date when a disease starts?

A. Date it from the time he is unable to work—perform.

Q. From the time he is unable to work. In fact, he did work at a gainful wage, well from 1919 to 1927, inclusive, each year, doesn't show that he was not totally and permanently disabled during those years, in your opinion?

A. It shows me, he should have been—just as I told you—I didn't think he should work at all.

Q. I am not asking you what he should have done. I am asking you what he did, whether in your opinion he was following a gainful occupation during those years?

A. I know nothing about it.

Q. You were the one who gave the answer a while

ago that he couldn't—that he was in your opinion totally and permanently disabled. Now I want to know why you say that in view of—

A. He came back to me in 1927 with the same condition existing, only worse, gradually getting worse, and I say from the time I saw him in 1919, then again in 1927, his condition was worse.

Q. That isn't what you did say. You said in answer to a question by Mr. Worthwine that in your opinion during all that time he was totally and permanently disabled, that is to say, he was in such a condition that he could not continuously follow any gainful occupation. That is what you said, didn't you?

A. Not "could not".

Q. Yes that is what you said, that he could not do it, despite his history. Isn't that what you said?

A. I said in my opinion he was totally and permanently disabled.

Q. What do you mean by totally and permanently disabled?

A. That he shouldn't work, and wasn't able to work, wasn't able to perform any duties, shouldn't be able to.

Q. You based that upon the assumed facts which Mr. Worthwine gave to you in his question, did you?

A. The history, yes.

Q. And that history included the actual following of a gainful occupation from 1919 to 1927, inclusive, didn't it?

A. Yes, sir.

Q. Now you ignore, as I understand it, in your opinion, you ignore the actual fact he did in fact follow a gainful occupation for that period of years?

MR. WORTHWINE: We object to that question, if your Honor please. That isn't the fact. We submit counsel should give the entire history as to his sickness and the amount of time he lost between those years, and the time he was sick and away from the work.

MR. GRIFFIN: I am asking about Mr. Worthwine's questions now, your Honor, and I am asking him what consideration he gave to the fact that this man did in fact follow a gainful occupation during those years. I have the right to ask what weight he gave to these different factors.

THE COURT: You can question him whether he took that into consideration.

MR. GRIFFIN: That is what I am doing, if your Honor please.

THE COURT: If he knows it to be a fact—of course he would probably have to assume it from what you embody in the question, unless he knows all of the facts during that period of time.

MR. GRIFFIN: That was in the history given him.

THE COURT: You may state to him what is in evidence, and then question him about it, that is, between those dates, between 1919 and 1927. Counsel can relate the facts that have been proven and ask him

to take that into consideration—if that would make any difference in forming his opinion.

MR. GRIFFIN: I will put it that way.

THE COURT: That is what counsel objects to.

MR. GRIFIN: All right.

Q. Assume Doctor, this man, beginning in July, July 14th, I think, 1919, went to work and worked nine hours a day up until the 28th day of July at sixty-five cents an hour, which was fifteen cents an hour more than the other men were getting; that he was engaged as a foreman in building forms for concrete, culverts and bridges on the highway; then that about a week after the 28th of July he returned to that work, worked during August in the same capacity at the same rate; that he was then recommended to another man for general foreman at seventy-five cents an hour; that he worked at that during the period until the fall of 1920 when there was work of that character to be done, in Bonneville County and partly in Bingham County; then that he returned to the first man and worked for him under him as a foreman in the same class of work at sixty-five cents an hour until the spring of 1921 when he went to Oregon, and was foreman there on concrete contracting until 1923 when he formed a partnership with Mr. Gardner, his brother-in-law, as subcontractors on concrete work on highway culverts and bridges, and that in 1923 he made two thousand dollars; in 1924, he made two thousand dollars; in 1925 he made two thousand dollars; in 1926 he made two thousand dollars, and in

1927 he made two thousand dollars, would that make any difference in your opinion as to whether during that period of time he was totally and permanently disabled?

MR. WORTHWINE: Now if your Honor please, we object to the question because it doesn't include all the facts. It doesn't include his sickness, or the time he was off work, and one of the facts counsel assumes is that he made that amount of money, when the evidence is that he was paid that from the partnership.

THE COURT: Does your hypothetical question cover the facts in this question?

MR. WORTHWINE: Yes, and a lot of others.

THE COURT: The doctor may take into consideration the facts in your question, and in counsel's question. Let him assume all that are in evidence. Counsel is asking now, would that make any difference in your opinion after considering the facts related by counsel for the plaintiff. You may consider both. Do you understand now?

A. Yes, sir. I think I do, your Honor.

THE COURT: You may answer.

A. It is quite a lot to digest. I consider the man, and still stay with it, consider that he was unable to work—disabled, totally and permanently disabled.

Q. You consider then, during that period of time—

A. Yes, sir.

Q. (Continuing.) That he was unable to follow continuously any substantially gainful occupation?

A. Yes, sir; I consider it so.

Q. During that period of time?

A. Yes.

Q. When you sent him to the Boise hospital, what did you send him over there for—to the Boise Veterans Hospital in 1928?

A. To see what they could do for him.

Q. You sent him over for a different condition you found, didn't you?

A. Beg pardon?

Q. You sent him over for a thyroid condition, didn't you?

A. No, sir.

Q. You made no diagnosis of a thyroid condition?

A. No, sir.

Q. Either in 1928 or 1929?

A. No.

Q. As a matter of fact he came back in 1929, early in 1929 to Blackfoot?

A. I don't remember—

Q. Wasn't he under your charge?

A. I made no diagnosis of a thyroid condition at all.

Q. Didn't you make any examination of him at that time, Doctor?

A. Yes, sir.

Q. All you found at that time was this gastro-enteroptosis?

A. That general condition of the stomach and bowels.

Q. When he came back from the hospital over to Blackfoot you didn't examine him again, then either?

A. No, sir.

Q. You didn't treat him during that time?

A. I saw him quite often at his home—relieved him the best I could.

MR. GRIFFIN: I think that is all.

MR. WORTHWINE: That is all, Dr. Hampton. We rest, your Honor.

MR. GRIFFIN: If your Honor please, if I could have five minutes, I think I could shorten this case very greatly.

THE COURT: Very well. We will be at ease for five minutes.

MR. GRIFFIN: (After intermission.) The Government will rest, if your Honor please. I will present this. (Paper handed to Court.) If your Honor desires us to present it, I would like to do it in the absence of the jury.

THE COURT: Gentlemen of the jury, I will excuse you for a few minutes. There is a matter here I have got to take up.

(Jury excused.)

THE COURT: Have you seen this motion, Mr. Worthwine?

MR. WORTHWINE: Yes I have your Honor.

THE COURT: I would like to hear you gentlemen on it.

MR. GRIFFIN: Reading:

“Comes now the defendant at the close of the evidence on behalf of the plaintiff, the plaintiff having rested and the defendant having rested, moves the Court to direct a verdict in favor of the defendant upon the ground that the evidence is insufficient to show that the insured became totally or permanently or totally and permanently disabled within the meaning of the insurance policy at a time when the policy was in full force and effect.

“2. That the evidence affirmatively shows that in fact the insured did follow continuously a gainful occupation subsequent to the lapse of the policy.

“3. That the evidence affirmatively shows that the insured followed a substantially gainful occupation during the years, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926 and 1927.

“4. That a verdict should be directed as to any payments claimed to accrue after May 1, 1929, the date of the death of the insured for the reason that the complaint does not plead any contract for the payment to beneficiary of any such payments after the death of the insured.”

THE COURT: Gentlemen of the jury, in the view I have taken of the law of this case, I feel compelled to find—to instruct you to find a verdict for the defendant. As a rule, in giving such instruction I briefly explain to the jury why it has been done in order that they may not feel that the Court has acted arbitrarily. You will remember this is an action brought by plaintiff upon

a war risk insurance policy issued to him on August 5th, 1918, and was in force until midnight of May 31st, 1919. The law and the policy provide that in the event the insured became totally and permanently disabled during the life of the policy he would be entitled to recover the amount of the policy, and before such recovery could be had it is necessary for him to show that he, in fact, became totally and permanently disabled during the period from the time of the issuance of the policy to the time it elapsed, and it is a case where he predicates his cause of action upon the claim that he became totally and permanently disabled. My analysis of the testimony in this case is that the plaintiff has not show that he in fact became totally and permanently disabled between the date of the issuance of the policy until the time it elapsed, as required by the policy and the law; that there is no evidence, as I view it, at all upon which to predicate a verdict of the jury, or a decree of the Court.

You may go into your jury room and I will send in a form of verdict, which will be in favor of the defendant. You will understand, gentlemen, that you take no responsibility in a matter of this kind, and the entire responsibility is upon me for this verdict.

MR. WORTHWINE: May we have an exception to your Honor's instructions.

THE COURT: Yes. This verdict reads, "On instructions of the Court," so you will understand. You

may retire, gentlemen, to have your foreman sign the verdict.

WHEREUPON, the jury retired, and upon their return the following proceedings were had:

MR. WORTHWINE: May we have an exception to the filing of the verdict, if your Honor please.

THE COURT: Yes, you may have an exception.

WHEREUPON, the verdict was read by the Clerk, and the following proceedings had:

THE COURT: Gentlemen, you may be excused until tomorrow morning at nine-thirty. You got an order for time to prepare a bill of exceptions in this case?

MR. WORTHWINE: Yes, your Honor, sixty days.

(Title of Court and Cause.)

CERTIFICATE OF JUDGE TO BILL OF
EXCEPTIONS.

STATE OF IDAHO, }
District of Idaho. } ss.

I, CHARLES C. CAVANAHA, United States District Judge for the District of Idaho, and the Judge before whom the above entitled action was tried, to-wit, the cause entitled Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles

E. Dyer, Plaintiffs, vs. United States of America, Defendant, which is No. 801 in the Eastern Division of said District Court,

DO HEREBY CERTIFY That the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence oral and in writing therein, and is a true bill of exceptions, and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of said Court, and thereafter duly and regularly served within the time authorized by law, and that no amendments were proposed to said bill of exceptions except such as are embodied therein, and that due and regular notice for settlement and certifying said bill of exceptions was given.

Dated at Moscow, Idaho, this 12th day of May, 1932.

CHARLES C. CAVANAH,
District Judge.

Service of the foregoing bill of exceptions and receipt of a copy is hereby acknowledged and accepted this 6th day of May, 1932.

H. E. RAY,
United States Attorney,

Charles E. Dyer vs.

SAM S. GRIFFIN,

Assistant U. S. Attorney,

Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR APPEAL.

Filed May 12, 1932.

The above named plaintiffs, Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer, conceiving themselves to be aggrieved by the orders and rulings made in the above entitled cause on the trial thereof on March 9, 1932, and by the judgment filed and entered on the 10th day of March, 1932, in the above entitled cause and proceeding, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for the reason and upon the grounds specified in the assignment of errors filed herewith and pray that their appeal may be allowed, that a citation issue as provided by law, and that a transcript of the records, proceedings, exhibits and papers upon which said judgment was entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and these plaintiffs pray for an

order fixing the bond which the plaintiffs shall give to secure to defendant the payment of costs if said plaintiffs should fail to sustain their contention in said appeal.

Dated this 12th day of May, 1932.

EARL W. CORY,

Residence: Blackfoot, Idaho,

HAWLEY & WORTHWINE,

Residence: Boise, Idaho,

Attorneys for Plaintiffs.

(Service acknowledged.)

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR

Filed May 12, 1932.

The above-named plaintiff files this as his assignments of error, and contends that the trial court erred in the following particulars in the trial of said cause:

I.

That the trial court erred in ruling and holding that the defendant was entitled to a directed verdict in its favor, and in directing the verdict in favor of the defendant.

II.

That the trial court erred in instructing the jury as follows:

“Gentlemen of the jury, in the view I have taken of the law of this case, I feel compelled to find—to instruct you to find a verdict for the defendant. As a rule, in giving such instruction I briefly explain to the jury why it has been done in order that they may not feel that the Court has acted arbitrarily. You will remember this is an action brought by plaintiff upon a war risk insurance policy issued to him on August 5, 1918, and was in force until midnight of May 31, 1919. The law and the policy provide that in the event the insured became totally and permanently disabled during the life of the policy he would be entitled to recover the amount of the policy, and before such recovery could be had it is necessary for him to show that he, in fact, became totally and permanently disabled during the period from the time of the issuance of the policy to the time it lapsed, and it is a case where he predicates his cause of action upon the claim that he became totally and permanently disabled. My analysis of the testimony in this case is that the plaintiff has not shown that he in fact became totally and permanently disabled between the date of the issuance of the policy until the time it lapsed, as required by the policy and the law; that there is no evidence, as I view it, at all upon which to predicate a verdict of the jury, or a decree of the court. You may go into your jury room and I will send in a form of verdict,

which will be in favor of the defendant. You will understand, gentlemen, that you take no responsibility in a matter of this kind, and the entire responsibility is upon me for this verdict.”

III.

That the trial court erred in receiving and filing the verdict.

IV.

That the trial court erred in sustaining the motion to strike part of the testimony of Charles E. Dyer, the father of Omey E. Dyer, and in ruling as follows:

“Q. Did he work?

A. He helped around with me. He wasn’t able to go on.

MR. GRIFFIN: Just a minute. I move to strike ‘He wasn’t able to go on’ as a conclusion.

THE COURT: It may be stricken.”

V.

That the trial court erred in ruling and holding that part of the testimony of the witness, A. T. Springer, should be stricken, when the following proceedings were had:

“Q. (By attorney for the plaintiff.) Now tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. Don’t state any conclusions.

A. He was either on crutches or had a cane, I don’t remember which to the best of my recollec-

tion. He was much lighter in weight than he was when I saw him before he went to the army, his complexion was bad, and he looked like a sick man.

MR. GRIFFIN: I move to strike 'he looked like a sick man' as a conclusion of the witness.

THE COURT: It may be stricken.

MR. GRIFFIN: And the jury be instructed not to regard it.

THE COURT: The jury understands that when any testimony is stricken by the Court they are not to consider it."

VI.

That the trial court erred in sustaining the objection of the testimony of the witness, John A. Gardner:

"Q. What was his color, was it healthful, or otherwise, after he got out of the army?

MR. RYDALCH: Object to the question as a conclusion.

THE COURT: Sustained."

VII.

That the trial court erred in sustaining the objection of the defendant to the testimony of Beulah E. Gardner as to the appearance of Omey E. Dyer, in the following particulars:

"Q. Did he appear to be a sick man or a well man?

MR. RYDALCH: Object to that question as leading, and furthermore as conclusion of the

witness. She could state how he appeared to her.

THE COURT: Sustained.”

Dated this 12th day of May, 1932.

EARL W. CORY,

Residence: Blackfoot, Idaho,

HAWLEY & WORTHWINE,

Residence: Boise, Idaho,

Attorneys for Plaintiff.

(Service acknowledged.)

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Filed May 12, 1932.

Upon the motion of the plaintiffs, appearing by their attorneys, Earl W. Cory and Messrs. Hawley & Worthwine, **IT IS ORDERED** that the appeal of the plaintiffs above named be allowed as prayed for by the plaintiffs in said cause.

AND IT IS FURTHER ORDERED that the amount of the bond be fixed in the sum of Five Hundred (\$500.00) Dollars as security for defendant's costs on appeal, and it is so ordered.

IT IS FURTHER ORDERED That a transcript of the record be forthwith transmitted to the

United States Circuit Court of Appeals for the Ninth
Circuit at San Francisco, California.

Dated this 12th day of May, 1932.

CHARLES C. CAVANAH,

Judge.

(Service acknowledged.)

(Title of Court and Cause.)

UNDERTAKING ON APPEAL.

Filed May 12, 1932.

KNOW ALL MEN BY THESE PRESENTS,
That we, Charles E. Dyer, administrator of the estate
of Omey E. Dyer, deceased, and Charles E. Dyer, in-
dividually, as principals, and The Fidelity and Casu-
alty Company of New York, a corporation, as surety,
are firmly held and bound unto the United States of
America in the sum of Five Hundred Dollars (\$500.-
00), to which payment well and truly to be made we
bind ourselves, and each of us, jointly and severally,
our heirs, executors and assigns.

WHEREAS, The plaintiffs in the above entitled
cause have appealed to the United States Circuit Court
of Appeals for the Ninth Circuit at San Francisco,
California, from a judgment rendered in the District
Court of the United States, for the District of Idaho,
Eastern Division, which judgment was made and en-

tered on the 10th day of March, 1932, wherein and whereby Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer were plaintiffs and the United States of America was defendant.

NOW, THEREFORE, The condition of the above obligation is such that if the said Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then the obligation shall be void, otherwise to remain in full force and effect.

Dated this 12th day of May, 1932.

CHARLES E. DYER,

Administrator of the Estate
of Omey E. Dyer, Deceased.

CHARLES E. DYER,

Principals.

THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK,

a corporation,

By CHAS. W. MACK,

Attorney-in-Fact,

(Seal)

Surety.

Countersigned by

CHAS. W. MACK,

General Agent.

The foregoing bond is hereby approved this 12th day of May, 1932.

CHARLES C. CAVANAH,
Judge.

Service of the within and foregoing bond is hereby accepted this 12th day of May, 1932.

H. E. RAY,
United States Attorney.
SAM S. GRIFFIN,
Assistant U. S. Attorney.

(Title of Court and Cause.)

PRAECIPE FOR APPEAL.

Filed May 12, 1932.

*To the Clerk of the District Court of the United States,
for the District of Idaho:*

Sir:

You will kindly prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a properly authenticated record of appeal in the above entitled cause, including therein the following documents:

- (a) Complaint.
- (b) Answer.
- (c) Motion for directed verdict.

- (d) Minutes of the court of proceedings on March 9, 1932.
- (e) Verdict.
- (f) Judgment on verdict.
- (g) Bill of exceptions.
- (h) Stipulation.
- (i) Petition for appeal.
- (j) Assignment of errors.
- (k) Order allowing appeal.
- (l) Citation.
- (m) Undertaking on appeal.
- (n) Praecipe for appeal.
- (o) Demand for production of papers at trial.
- (p) Any other file, paper or assignment required to be incorporated in the transcript of record herein under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 12th day of May, 1932.

EARL W. CORY,

Residence: Blackfoot, Idaho.
and

HAWLEY & WORTHWINE,

Residence: Boise, Idaho,

Attorneys for Plaintiffs.

Service accepted this 12th day of May, 1932.

H. E. RAY.

SAM S. GRIFFIN.

(Title of Court and Cause.)

STIPULATION.

Filed May 12, 1932.

IT IS HEREBY STIPULATED By and between H. E. Ray, United States Attorney for the District of Idaho, and SAM S. GRIFFIN, Assistant United States Attorney for the District of Idaho, attorneys of record for the appellee, and EARL W. CORY and HAWLEY & WORTHWINE, attorneys of record for the appellant, that in printing the abstract of record in the above entitled cause that all titles of papers, acceptances of service and verifications may be omitted save and except that the complaint shall bear the title of said cause.

Dated this 12th day of May, 1932.

H. E. RAY,

United States Attorney
for District of Idaho.

SAM S. GRIFFIN,

Assistant U. S. Attorney
for District of Idaho,

Attorneys for Appellee.

EARL W. CORY,

Residence: Blackfoot, Idaho.

HAWLEY & WORTHWINE,

Residence: Boise, Idaho,

Attorneys for Appellant.

(Title of Court and Cause.)

CITATION ON APPEAL.

Filed May 12, 1932.

The President of the United States

To the United States of America, and H. E. Ray, Wm. H. Langroise, Sam S. Griffin and Ralph R. Bre-shears, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to appeal filed in the Clerk's office of the District Court of the United States, for the District of Idaho, Eastern Division, wherein Charles E. Dyer, administrator of the estate of Omey E. Dyer, deceased, and Charles E. Dyer are plaintiffs, and you are defendant, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS The Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 12th day of May, 1932.

CHARLES C. CAVANAUGH,

United States District Judge
for District of Idaho,
Eastern Division.

W. D. McREYNOLDS,
Clerk.

(Seal)

Service accepted this 12th day of May, 1932.

H. E. RAY
SAM S. GRIFFIN,
U. S. Atty.

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 114 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$139.45 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 7th day of June, 1932.

(Seal)

W. D. McREYNOLDS, Clerk.